Union shall be convened as soon as possible after March 31 and not later than September 30 every alternate year. It was held that the dispute should first be decided by reference to arbitration in accordance with Rule 26 of the Union, which provided that every dispute between a member and the Union shall be decided by reference to arbitration.

Appeal allowed

Solicitors: *Lim Kean Siew & Co.; Azman, Davidson & Co.*

MALAYSIAN BAR & ANOR. v. GOVERNMENT OF MALAYSIA

[S.C. (Salleh Abas L.P., Mohamed Azmi & Wan Hamzah S.C.J.) July 30, 31 & November 27, 1986]

[Kuala Lumpur — Supreme Court Civil Appeal Nos. 29 and 56 of 1956]

Constitutional Law — Equal protection — Disqualification of advocates and solicitors of less than seven years' standing from being members of Bar Council, State Bar Committee or any committee of such Council or Committee — Whether provision is discriminatory, invidious and destructive of the unity of the Malaysian Bar and therefore violates the equal protection clause of the Federal Constitution — Whether classification based on reasonable and permissible criteria — Nexus between the basis of classification and the legitimate object of the Legal Profession Act as amended — Legal Profession Act, 1976, s. 46A(1)(a) — Federal Constitution, art. 8.

Legal Profession — Restriction of membership of Bar Council, State Bar Committees and Committees formed by the two bodies to lawyers of not less than seven years' standing — Whether this violates the equal protection clause of the Federal Constitution — Legal Profession Act, 1976, s. 46A(1)(a) — Federal Constitution, art. 8.

The issue which was raised in this appeal was the constitutionality of sub-section (1)(a) of section 46A of the Legal Profession Act, 1976, which restricts membership of the Bar Council, State Bar Committee and Committee of the Bar Council or Bar Committee to advocates and solicitors of not less than seven years' standing. The appellants contended that the requirement violates the equal protection clause of Article 8 of the Federal Constitution because it denies the Council and the Committee the benefit of using the talents of those lawyers with less than seven years' standing and also it denies this group of lawyers representation in the governing bodies of the legal profession. They argued that such discrimination was discriminatory, invidious and destructive of the unity of the Malaysian Bar and therefore violates the equal protection clause of Article 8(1) of the Constitution. Harun J. in the High Court held that paragraph (a) of section 46A(1) is not unconstitutional in so far as it disqualifies a lawyer with less than seven years' standing from being a member of the Bar Council and a State Bar Committee but unconstitutional as regards disqualifying him from being a member of a Committee of the Bar Council or a State Bar Committee, see [1986] 2 M.L.J. 225. Both parties were dissatisfied and there was an appeal and cross-appeal to the Supreme Court.

Held, by a majority (Salleh Abas L.P., dissenting): (1) the classification in sub-section (1)(a) of section 46A of the Legal Profession Act 1976 is based on reasonable as well as permissible criteria. There is clearly a nexus between the basis of classification and the legitimate object of the Legal Profession Act as amended and as such the classification is valid and constitutional. No fundamental rights guaranteed by the Federal Constitution have been violated by the impugned subsection and on the basis of suspect classification it has passed the intelligible differentia and nexus test. Indeed the impugned section would appear to have satisfied even the legitimate or compelling state or governmental test, required in the United States. On those grounds the appeal must be dismissed;

(2) for the same reasons the respondent's cross-appeal must be allowed as there can be no difference in classification based on experience between membership of the Bar Council, the Bar Committees and any committee formed by those two bodies.

Cases referred to:

(1) *Lindsley* v. *National Carbonic Gas Co.* (1911) 220 U.S. 61, 76-79; 55 L. Ed. 369.
(2) *Datuk Haji Harun bin Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 155, 165-166.
(3) *In re Griffith* [1973] 413 U.S. 717: 37 L. Ed. 2nd 910.
(4) *Slaughter House Cases* 83 U.S. (1873) 16 Wall 36; 21 L. Ed. 394.
(5) *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356; 30 L. Ed. 220
(6) *State of Bombay* v. *F.N. Balsara* A.I.R. 1951 S.C. 318, 326.
(7) *Korematsu* v. *U.S.* (1943) 320 U.S. 81, 100; 87 L. Ed. 1774.
(8) *Graham* v. *Richardson* (1981) 403 U.S. 365, 371-372, 29 L. Ed 2nd 534.
(9) *Brown* v. *Board of Education* (1954) 245 U.S. 483, 489-490.
(10) *Shapiro* v. *Thompson* (1965) 394 U.S. 618, 638.
(11) *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.* [1976] 2 M.L.J. 116, 117.
(12) *Merdeka University Berhad* v. *Government of Malaysia* [1981] 2 M.L.J. 356, 358.
(13) *Manilal (Manibhai) Gopalji Desai* v. *Union of India* A.I.R. 1960 Bom. 83.
(14) *Boiling* v. *Sharpe* (1954) 347 U.S. 497.
(15) *Chimento* v. *Stark* (1973) 353 F. Supp. 1211; affirmed (1973) 414 U.S. 802.

SUPREME COURT.

Raja Abdul Aziz Addruse (*Ronald T.S. Khoo, C.V. Das* and *P. Cumaraswamy* with him) for the appellant

T. Selventhiranathan (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult

Salleh Abas L.P.: The first appellant, the Malaysian Bar, is a body corporate created under section 41 of the Legal Profession Act 1976 (the Act) with a number of stated objects and powers. All lawyers upon being admitted to practise as advocates and solicitors automatically become members of the first appellant (section 43 of the Act). The management of the affairs of the first appellant is entrusted to a Council, known as the Bar Council (section 47 of the Act) consisting of (a) a President, Vice-President (b) the Chairman of each State Bar Committee, and a member elected by each such Committee and (c) a specified number of members elected annually under a formula and procedure laid down in sections 49, 50 and 51 of the Act.

When the Act initially came into force on June 1, 1977, there were no restrictions as to the eligibility of persons to be members of the Bar Council. Every lawyer who is a member of the Malaysian Bar was qualified to serve on the Council. However, since January 24, 1978, a lawyer with less than seven (7) years' standing has been disqualified. The disqualification was introduced by the Legal Profession (Amendment) Act 1978 which enacted a new section 46A. The relevant provision thereof is subsection (1) which is as follows:

"Disqualification for Membership of Bar Council, Bar Committee, etc.

46A. (1) A person shall be disqualified for being a member of the Bar Council or a Bar Committee, or of any committee of the Bar Council or a Bar Committee –

(a) unless he is and has been an advocate and solicitor for a period of not less than seven years, or for periods which in the aggregate amount to not less than seven years; or

(b) if he is a member of either House of Parliament, or of a State Legislative Assembly or of any local authority; or

(c) if he holds any office in –

(i) any trade union; or
(ii) any political party; or
(iii) any other organisation, body or group of persons whatsoever, whether or not it is established under any law, whether it is in Malaysia or outside Malaysia, which has objectives or carries on activities which can be construed as being political in nature, character or effect, or which is declared by the Attorney General by order published in the *Gazette*, to be an organisation, body or group of persons which has such objectives of carries on such activities."

According to the affidavit sworn by the first appellant's Vice-President, the Bar Council has no less than seventeen (17) Committees, each with various functions, and that as at February 26, 1985 there were 1,760 practising lawyers of whom 790 or 44.8% had less than seven years' standing. Thus, only the remaining 970 or 55.2% of the lawyers were available to serve on the Bar Council and the State Bar Committee, or any committee of either of these two. The seven years' standing requirement therefore disqualifies practically almost half of the total number of lawyers.

The second appellant is a lawyer who was admitted to practice on September 30, 1981 and had a little more than three years' standing at the time when the proceedings were instituted in the High Court and being a lawyer with less than seven years' standing he was and still is disqualified from being a member of the Bar Council, State Bar Committee or any committee of such Council or Committee.

It is the contention of both the appellants that paragraph (a) of subsection (1) of section 46A denies to the Bar Council the benefits of using the talents of those disqualified lawyers and at the same time denies to these lawyers representation in the Council. Such provision, they argued, is discriminatory, invidious and destructive of the unity of the Malaysian Bar and therefore violates the equal protection clause of Article 8(1) of the Federal Constitution.

Harun J. in the High Court held that paragraph (a) of section 46A (1) is not unconstitutional in so far as it disqualifies a lawyer with less than seven years' standing from being a member of the Bar Council and a State Bar Committee but unconstitutional as regards disqualifying him from being a member of a committee of the Bar Council or a State Bar Committee.

The requirement for equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the laws so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. Individuals in any society differ in many respects such as, *inter alia*, age, ability, education, height, size, colour, wealth, occupation, race and religion. Any law

made by a legislature must of necessity involve the making of a choice and differences as regards its application in terms of persons, time and territory. Since the legislature can create differences, the question is whether these differences are constitutional. The answer is this: if the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provision is constitutional and valid. If on the other hand there is no such relationship the difference is stigmatized as discriminatory and the impugned legislation is therefore unconstitutional and invalid. This is known as the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause. Its classic rendering is well summarized in *Lindsley* v. *National Carbonic Gas Co.*[1] in the following terms:

"1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A Classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Raja Abdul Aziz, counsel for the appellants, whilst accepting that the doctrine of classification laid down by Suffian L.P. in *Datuk Haji Harun bin Idris* v. *Public Prosecutor*[2] is still good law, nevertheless urged us to attempt a new approach and treat the impugned provision as a suspect classification and thus against the equal protection clause. He relied very extensively on two academic articles published in the *California Law Review*, "The Equal Protection of the Laws" by Joseph Tussman and Jocobus tenBroek: 37 Cal. L.R. 341; and in *Harvard Law Review* "Developments – Equal Protection": 82 Harv. L.R. 1067, 1170. He also relied on the U.S. Supreme Court decision in *In re Griffiths.*[3]

I should perhaps in deference to his submission examine this suggested new approach by looking at the jurisprudential development of this clause in the United States.

The clause was introduced by section 1 of the 14th Amendment to the American Constitution which was adopted in 1868. Its wording is as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Initially, the intended beneficiaries were the Negroes. As they had just then been emancipated a great need was felt for their protection against arbitrary treatment by the States which would thus enable them to enjoy full freedom. However, later development shows that the equal protection clause was made available against all kinds of discrimination extending far beyond the original encompassed objective. This development was at first slow because of the prominence given to the concept of due process which is also part of section 1 of the 14th Amendment. It was not until the famous *Slaughter House*[4] cases and *Yick Wo* v. *Hopkins*[5] that the concept of equal protection began to take shape in American jurisprudence which later influenced the Indian and our Constitutions.

In the meantime decisions of the American Courts on equal protection clause became the subject of meticulous studies by American legal scholars. They all seem to agree that there are two standards used by American courts in interpreting this clause. These are the 'traditional' and 'new' standards reflecting judicial attitude of the United States Supreme Court Judges at different periods of time described by critics as being 'conservative' and 'restrained' as opposed to 'liberal' and 'active.'

The traditional standard according to American legal scholars is one by which the court presumes the constitutionality of the impugned legislation unless the challenger can show that there is no reasonable basis for the classification having regard to the object of the legislation. When employing this standard the court is in effect very cautious and adopts a restrained posture in its examination of the impugned legislation. The passage I have quoted in *Lindsley* (*supra*) represents this standard. This is the standard which has been accepted by the Indian Supreme Court and our Federal Court in *Datuk Harun's* case (*supra*). Fazl Ali J. in *State of Bombay* v. *F.N. Balsara*[6] quoted with approval the following extract from

Professor *Willis'* Constitutional Law, 1st ed. at 578:

"The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances & conditions both in the privileges conferred & in the liabilities imposed.' 'The inhibition of the amendment . . . was designed to prevent any person or class of persons from being singled out as a special subject for discriminating & hostile legislation.' It does not take from the states the power to classify either in the adoption of police laws or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, & nullifies what they do only when it is without any reasonable basis. Mathematical nicety & perfect equality are not required. Similarly, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."

The other standard, *i.e.* the 'new standard' is one by which the court will adopt an active review and hold a rigid scrutiny of the impugned legislation as there can be no presumption of constitutionality in its favour. According to this standard the classification is suspect and can have no reasonable connection at all between its basis and the object of the impugned legislation, and is, therefore, a forbidden classification. Suspect classifications have been held to invalidate laws which discriminate on the basis of race – *Korematsu* v. *U.S.*[7] and on the basis of nationality or alienage (*Graham* v. *Richardson*[8] and *In re Griffiths*). All cases of school segregation which were held to be unconstitutional were also based on suspect or forbidden classification (*Brown* v. *Board of Education*). The new standard is also employed to invalidate a law if the classification affects fundamental interests, such as the right to move freely within the United States (*Shapiro* v. *Thompson*).[10]

The general basic principle culled from the authorities and judicially determined, succinctly put, is that article 8(1) permits reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question (*Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.*).[11] Under the traditional test a classification is permissible if it is not shown to be arbitrary; there is consistent deference to legislative determinations as to the desirability or adequacy of particular statutory objectives, and discriminations need only be plausibly related to public interests that are not demonstrated to be illegitimate. If however the court determines that the challenged statutory classification affects a fundamental right or is drawn on the basis of suspect criteria, then a mere rational connection between the selected legislative goal and the enacted legislative differentiation will not suffice *per se*, and in such a case a stricter scrutiny and a higher degree of precision than ordinarily required will be necessary. In reality the treatment of suspect classification does not differ much from the traditional test as both are primarily concerned with the question of whether or not there is a reasonable basis for the classification.

Turning now to a consideration of the matter before us against the background of the principles I have discussed, the issue that arises for determination revolves on the question of the basis for classifying advocates and solicitors into those with and without 7 (seven) years' standing and whether the inter-relation of the basis with the object of paragraph (a) of subsection (1) of section 46A is reasonable.

On a considered view of the matter, I find that section 46A(1)(a) which debars any advocate and solicitor of less than an aggregate of 7 years' standing from being a member of the Bar Council or a Bar Committee or of any committee of these two bodies embodies a classification without any reasonable basis and which is purely arbitrary and discriminatory with no sufficient nexus with the objective and purpose sought to be achieved by its enactment. If a person admitted as an advocate and solicitor of the High Court is entitled to practise immediately upon his admission, there appears to be no plausible justification for providing for such person as a class or group to be without *representation in respect of that class* or group on their professional governing and other related bodies until and unless he has attained the status of an advocate and solicitor of not less than 7 years' standing. On the statistics put in evidence and which I have earlier adverted to, it would appear that the legislative provision in issue seeks to deprive at least some 45% of the number of lawyers currently in practice – almost half that number, with the percentage no doubt increasing from day to day as new admissions occur – from having a say through representatives of their class in the running of the affairs of their profession. This must therefore be discriminatory, particularly if viewed in the light of the provision of section 35(1) which specifically enacts *inter alia* that all advocates and solicitors as between themselves shall have the same rights and privileges

without differentiation, section 43 which makes every advocate and solicitor automatically a member of the Malaysian Bar, and section 44 which goes on to specify his rights and eligibility in certain vital respects stipulated therein until paragraph (b) thereof was amended to make his eligibility to be elected to the Bar Council subject to section 46A. I pause here to observe that it is ironic that section 44 entitles all advocates and solicitors to attend and vote at any general meeting and to vote on the election of members of the Bar Council but now purports to restrict their rights to be elected to the Bar Council in the manner stipulated in section 46A.

I must make it abundantly clear that I am not in any way adjudicating on the wisdom of executive policy. The courts are not concerned with policy as such which can only be judicially considered if and when it has been implemented by legislation and translated into law, and I would refer to what was said by Abdoolcader J. (now S.C.J.) in this regard in *Merdeka University Berhad* v. *Government of Malaysia.*[12] I am accordingly only concerned with the validity of the law as enacted in section 46A(1)(a) scrutinised in the light of the relevant constitutional provision relied on by the appellants, namely, article 8 of the Federal Constitution.

The position in my view would be different if section 46A had in fact provided for proportional representation as they have in England, that is to say, for a certain number of representatives to be elected to the governing body or other committee of the profession to represent members classified according to the length of their years of standing at the Bar. This classification would be reasonable, as no particular group or class of practitioners composed according to age, standing or similar restrictive criteria can then dominate the management of the affairs of the profession, and indeed in *Manilal (Manibhai) Gopalji Desai* v. *The Union of India*[13] the High Court of Bombay upheld the provisions of section 4(3) of the Bar Councils Act, 1926 which conferred a power on the High Court to make provisions for reservations of seats for certain classes of lawyers as not being discriminatory. The legislative provision under attack in this appeal effectuates a total deprivation of representation of a class of members of the Malaysian Bar, designated as such without any reasonable basis for the classification, to advance, ventilate and articulate the particular sectional interests of that class in the administration of the affairs of their profession through elected representatives on the relevant bodies from that class itself. I would in this regard also refer to the provisions of section 46(2) which specifically provide that in fixing the amount of subscription to be paid by members of the Malaysian Bar, the Bar Council shall be at liberty to divide members into classes, and to provide that different amounts shall be paid by different classes and for different periods.

I hold for the reasons I have given, and applying the doctrine of severability to the provisions of section 46A of the Act, that paragraph (a) of subsection (1) of section 46A is void, and this will of course seal the fate and dispose of the cross-appeal though for wholly different reasons from those of the court below. I accordingly in the circumstances allow the appeal and dismiss the cross-appeal, set aside the order of the learned Judge on the substantive appeal and make a declaration in terms of prayer (1) of the appellants' summons. On the matter of costs I direct that each party shall pay its own costs both here and below and that the deposit lodged in court by way of security is to be refunded to the appellants.

Mohamed Azmi S.C.J.: The crucial issue in this appeal is the constitutionality of sub-section (1)(a) of section 46A of the Legal Profession Act 1976 which restricts membership of the Bar Council, State Bar Committees and as well as Committees formed by the two bodies, to lawyers of not less than seven years' standing. The appellants contend that the requirement violates the equal protection clause of Article 8 of the Federal Constitution because it denies the Council and the Committees the benefit of using the talents of those disqualified lawyers and also it denies this group of lawyers with less than seven years' standing, representation in the governing bodies of the legal profession. The impugned sub-section which came into force on January 24, 1978, was introduced by the Legal Profession (Amendment) Act 1970 (Act A419), and it reads as follows:

> "46A(1)(a). A person shall be disqualified for being a member of the Bar Council or a Bar Committee, or of any Committee of the Bar Council or a Bar Committee unless, he is and has been an advocate and solicitor for a period of not less than seven years, or for periods which in the aggregate amount to not less than seven years."

Applying the reasonable test, Harun J. made a split decision by holding that the restriction imposed on membership of the Bar Council and Bar Committee was constitutional, but its application to the Committees of the two bodies was unreasonable

and therefore unconstitutional. In the result, both parties are dissatisfied and hence the present appeal and cross-appeal.

The concept of equal protection is not universal. At one end of the spectrum are countries like Australia which have no equal protection clause in their constitution (see the Australian Federal system by Lane, Second Edition, page 856n). At the other end is the United States of America which by its Fourteenth Amendment provides that, "No State shall . . . . ; nor deny to any person within its jurisdiction the equal protection of the laws.' Although there is no equal protection clause that governs the action of the Federal Government, the courts in the United States have through judicial determination, employed the due process clause of the Fifth Amendment to achieve the same result, if the Federal Government classifies individuals in a way which would violate the equal protection clause. It should be noted that the Fifth Amendment contains no equal protection clause, but it does forbid discrimination that is so unjustifiable as to be violative of due process (see *Shapiro* v. *Thompson*[10] and *Boiling* v. *Sharpe*[14]). The courts also set the same standard for validity under the Fifth Amendment due process and the Fourteenth Amendment equal protection clauses, which are both jointly referred to as the equal protection guarantee. To be valid under either clause, the United States Supreme Court has used a stricter standard of review in the area of fundamental rights or suspect classifications than in the area of economics or social welfare. In particular, a legislative classification must not be based upon impermissible criteria or used arbitrarily to burden a group of individuals. To attain constitutional validity, the courts must be satisfied that the State has a legitimate governmental interest as opposed to mere governmental purpose in creating the burden or restriction when dealing with fundamental rights guaranteed by the Constitution. (See Handbook On Constitutional Law by Nowak, Rotunda and Young at pages 517-535). In this country, the equal protection guarantee can be found in Article 8 of the Federal Constitution, the relevant parts of which are contained in clauses (1) and (2):

"8(1). All persons are equal before the law and entitled to the equal protection of the law.

8(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law ....."

What is the standard for validity under Article 8? Three of the nine principles based on Indian decisions and approved by the Federal Court in *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor*[2] may be reproduced as follows:

(a) The first question to be asked is, is the law discriminatory, and that the answer should then be – if the law is not discriminatory, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation, we have to ask the further question, is it allowed? If it is, the law is good, and if it is not the law is void.

(b) Discriminatory law is good law if it is based on "reasonable" or "permissible" classification, provided that –

(i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

(c) In considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

On the law as to the doctrine of classification, I should add nothing else on my own account. Following the principle laid down in *Lindsley* v. *National Carbonic Gas Co.*[1] and *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor* (*ante*) if the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provision is constitutional and valid. In his argument, Raja Abdul Aziz, counsel for the appellants has referred extensively to two American essays – one published in 1949 in the *California Law Review* entitled "The equal protection of the laws," and the other published in 1969 in the *Harvard Law Review* on "Development in the law – equal protection." I have considered the

two essays in the light of current development of the law on equal protection in the United States including the U.S. Supreme Court decision in *In re Griffiths*[3], and I am inclined to the view that a classification can only be reasonable if it includes all persons who are similarly situated with respect to the purpose of the law, and not merely on the simple basis that if everybody is in the same class, then there is no discrimination. Be that as it may, there is no question of discarding the traditional or simple approach in favour of the suspect classification, for in reality both are primarily concerned with the question of whether or not there is a reasonable or permissible basis for the classification, and that for such determination the court must review the real object of the legislation. However, as stated earlier, the United States Supreme Court has used a stricter standard of review in the area of fundamental rights or suspect classifications than in other areas, in that a compelling governmental or state interest must be shown in the classification or burden imposed on a particular group of individuals.

Having stated the law, I now turn to consider its application to the facts of the case under appeal. The double negatives used in sub-section (1)(a) of section 46A in reality impose a durational experience qualification, whilst paras. (b) and (c) of section 46A(1) disqualify lawyers who are members of Federal or State Legislatures, and also those who hold office in any trade union, political party or organisation of political nature. The durational classification based on professional experience is clearly founded on an intelligible differentia. The question is, in what way can such differentia be argued as having no rational relation or nexus with the legislative policy or object? Surely, it is in the public interest or to use the American parlance 'in the legitimate or compelling state or governmental interest' that the Malaysian Bar should be independent and managed by experienced lawyers, for such a Bar ensures an experienced and independent judiciary. Neither the Bill nor the amending Act has expressly stated the object and reason for the impugned sub-section. As such, the court must infer the real object of the Act from the whole scheme of the Legal Profession Act. Having considered the Act as a whole and in the absence of evidence to the contrary, I am satisfied that by section 46A(1)(a) Parliament intends to ensure, having regard to the heavy responsibilities of the Council and the Committees imposed by sections 42 and 72, that the governing bodies of the legal profession should be effectively and independently run by –

(a) persons of considerable experience in the legal profession;

(b) persons who are not members of the legislature;

(c) persons who are not active in politics or trade union.

There is therefore a strong nexus between the durational experience classification and the legislative policy or object of the impugned legislation. As conceded by Raja Abdul Aziz, there is no violation of Article 8(2) since the impugned sub-section does not contain any discrimination against citizens on the ground only of religion, race, descent or place of birth. Sub-section (1)(a) of section 46A merely imposes a qualification of "not less than seven years" standing or "for periods which in the aggregate amount to not less than seven years" before an advocate and solicitor can serve as a member of the council or committee. This applies to all advocates and solicitors, although under section 43 they become members of the Bar so long as they have valid practising certificates, and under sections 44 and 70A they are also entitled to attend and vote at any general meeting including voting on the election of their representatives to the Bar Council and State Bar Committees. The only impediment is that irrespective of age, new lawyers with less than seven years' standing cannot offer themselves as candidates or be appointed to the governing bodies in case of any vacancy.

The very scheme of the Legal Profession Act and its predecessor, the Advocates and Solicitors Ordinance 1947, recognises the need for professional experience, and as such that requirement is not new or abnormal. Under sections 12 and 13 of the Legal Profession Act, a pupil must serve "his period of pupillage with an advocate and solicitor who is or has been in active practice in Malaysia for a total period of not less than seven years immediately preceding the date of commencement of his pupillage," except on special grounds given by the Bar Council. Under section 94 the Bar Council is also required to "appoint an Inquiry Committee comprising twelve members of the Malaysian Bar none of whom shall be of less than seven years' standing." Similarly, in appointing members of a disciplinary committee under section 99, the Chief Justice must make the appointment "from among advocates and solicitors of not less than seven years" standing and having valid practising certificates. Raja Abdul Aziz concedes that the discrimination in the classification in section 13 is

reasonable having regard to the legislative objective. As a basis for classification, I cannot see any distinction in principle between the 'experience qualification' required under the three sections and the one under the impugned sub-section, having regard to the statutory objects and powers of the Malaysian Bar as spelt out under section 42 of the Act. The Malaysian Bar is not intended to be a social or sporting Association registered under the Societies Act, although promoting good relations and social intercourse amongst members, and between members and other persons concerned in the administration of law and justice is one of its statutory functions. The classification of members into those with and without seven years' experience, for the purpose of election to the Bar Council and Committees, is to my mind not at all arbitrary or unreasonable. To consider but a few examples under section 42, how else could the governing bodies effectively uphold the course of justice uninfluenced by fear or favour, and without regard to their own interest or that of their members; improve the standard of conduct and learning of the legal profession; facilitate the exposition of legal knowledge by members; express views when so requested on matters affecting legislation and the administration and practice of the law, unless members of the council and committees are lawyers of sufficient experience in the legal profession? Unlike ordinary associations, professional bodies must place the interest of the profession above any individual or sectional interests, and as such the fact that about 44.8% of the members of the Malaysian Bar have less than seven years' standing and are therefore not qualified to be members of the governing bodies, does not render the classification unreasonable or arbitrary. The arguments that the impugned sub-section denies the Bar Council the benefits of using the talents of those disqualified lawyers and also that it denies those lawyers representation in the Council, have no real basis. On the denial of talents argument, which must necessarily mean talents in areas other than the legal profession, it is absurd to suggest that there must be such denial unless the new lawyers who might be talented say in football, music or secretarial work, are allowed to sit in the council or committees. There can be no such loss so long as they are willing to contribute their talents as members. On the denial of representation argument, the right to representation is distinct from the right to candidacy. The fact that new lawyers as a class are disqualified from serving in the governing bodies, does not mean that they are without representation, unless they are also denied the right to vote at election due merely to their lack of professional experience. Since the right of voting is not affected, I fail to see how there can be a denial of representation. In any event, the burden or restriction imposed by the impugned sub-section is only temporary. The durational experience requirement only delays the opportunity of new lawyers to become candidates or be appointed to the governing bodies, and as such it is valid provided the length of the delay is not patently unreasonable. In the United States, although the constitutionality of durational residency requirement in election is still an open question, the U.S. Supreme Court affirmed the decision in *Chimento* v. *Stark*,[15] where it was held that the State had a legitimate interest in creating a seven-year durational residency requirement in an election for governorship, and the delayed opportunity to become candidate was also held to be valid in terms of the equal protection guarantee on the ground, *inter alia*, that the restriction helped to ensure not only that candidates would become familiar with local issues, but also that local voters would become familiar with the candidates. In the same way, the seven-year requirement helps to ensure that lawyers would have sufficient professional experience and would also familiarise themselves with the various problems of the Bar before they serve in the governing bodies of the legal profession. The seven-year period from the date a lawyer is called to the Bar has not been shown to be patently unreasonable in terms of professional experience. I am therefore of the opinion that the classification in sub-section (1)(a) of section 46A is based on reasonable and as well as permissible criteria. There is clearly a nexus between the basis of classification and the legitimate object of the Legal Profession Act as amended, and as such the classification is valid and constitutional. No fundamental rights guaranteed by the Federal Constitution have been violated by the impugned sub-section, and on the basis of suspect classification, it has passed the 'intelligible differentia and nexus' test. Indeed, the impugned sub-section would appear to have satisfied even the 'legitimate or compelling state or governmental interest' test, required in the United States.

On the grounds above expressed, I am of the opinion that this appeal ought to be dismissed with costs. For the same reasons, I would allow the respondent's cross-appeal, as there can be no difference in law in classification based on experience between membership of the Bar Council, the Bar Committees and any committee formed by these two bodies. It should however be observed that the power of the Bar Council to

appoint committees is governed by section 58. There appears to be no similar power given to the State Bar Committees. Finally, I would also order that the deposit should be paid to the respondent on account of taxed costs.

Wan Hamzah S.C.J.: In my judgment, there is nothing in section 46A(1)(a) of the Legal Profession Act which offends Article 8(1) or Article 10(1)(c) of the Federal Constitution, and therefore the application of the plaintiffs for a declaration that section 46A(1)(a) is void should be dismissed. For the reasons stated by Mohamed Azmi S.C.J. I agree that the plaintiffs' appeal should be dismissed and that the defendant's cross-appeal should be allowed. An order should be made setting aside the decision of the Judge of the High Court that the words "or of any committee of the Bar Council or Bar Committee" appearing in section 46A(1) are void.

Appeal dismissed; cross-appeal allowed.

Solicitors: *Shook Lin & Bok.*

SAVRIMUTHU v. PUBLIC PROSECUTOR

[S.C. (Salleh Abas L.P., Abdul Hamid C.J. (Malaya) & Hashim Yeop A. Sani S.C.J.) August 25 & December 1, 1986]

[Kuala Lumpur – Supreme Court Criminal Reference No. 2 of 1986]

Criminal Law and Procedure – Transfer of case to High Court – Charge of trafficking in dangerous drugs – Accused charged in the Sessions Court – Consent for prosecution given by Public Prosecutor – Date of hearing fixed – Requisition of Public Prosecutor to have case tried in High Court – Refusal of President, Sessions Court to transmit case to High Court – Appeal to High Court – Reference to Supreme Court – Dangerous Drugs Act, 1952, ss. 39B & 41(2) – Courts of Judicature Act, 1964 s. 48(1) – Federal Constitution, art. 7(1).

Constitutional Law – Transmission of pending cases to High Court – Federal Constitution art. 7.

In this case the applicant had been charged in October 7, 1982 in the Sessions Court at George Town, Penang with an offence under section 39B of the Dangerous Drugs Act, 1952. On April 25, 1983 the Public Prosecutor's sanction was tendered and the Court proceeded to fix the date of hearing. Subsequently the prosecution tendered the Public Prosecutor's requisition under section 41(2) of the Act with a view to have the case tried by the High Court. However, the learned President of the Sessions Court refused to transmit the case to the High Court, being of the view that the applicant had acquired a vested right to be tried in the Sessions Court once the Public Prosecutor had indicated his election to have the trial held in that court by tendering his consent to prosecute. The Public Prosecutor appealed to the High Court.

The learned trial judge stayed the proceedings and referred the following question to the Supreme Court: "Whether for the purpose of Article 7(1) of the Federal Constitution an accused person derives a vested right when (1) he is charged or (2) after his trial has commenced."

Held: (1) pending cases could still be tried in the Sessions Court unless the Public Prosecutor chooses to have them tried in the High Court by the issue of a requisition under section 41(2);

(2) the Public Prosecutor's requisition is valid only in respect of cases of which trials have not yet begun. If trials have already commenced in the Sessions Court, his requisition is invalid and the court therefore should continue to try them. The trial is said to have commenced when evidence has begun to be adduced;

(3) if pending cases have been transmitted to the High Court pursuant to Public Prosecutor's requisition, it is not open to High Court to remit them to the courts below by invoking section 417 Criminal Procedure Code, or any other written law. Subsection (3) of section 41 of the Dangerous Drugs Act which gives effect to the Public Prosecutor's requisition should prevail, this being a special law;

(4) the transmission of pending cases to the High Court is not in violation of Article 7(1) of the Constitution, as the punishment for which the accused is liable remains the same as it was before the amendments. Death penalty is not mandatory for such cases, but only discretionary.

Cases referred to:

(1) *Public Prosecutor* v. *Hun Peng Khai & Ors.* [1984] 2 M.L.J. 318.

(2) *Public Prosecutor* v. *Cheah Cheng Eng* [1986] 2 M.L.J. 39.

(3) *Public Prosecutor* v. *Jusoh bin Samah,* Kuantan Criminal Trials Nos. 4 & 9 of 1984.

SUPREME COURT.

Karpal Singh (*V. Sithambaram* and *San Markan Ganapathy* with him) for the applicant.

Mohamed Noor bin Haji Ahmad (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): This is a reference under section 48(1) of the Courts of Judicature Act made by Dzaiddin J. at the instance of Mr. Karpal Singh's application on behalf of the applicant.

The facts are as follows:

The applicant was charged in the Sessions